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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 180.

JENNIE A. WILLINK, EXECUTRIX OF HENRY F. WILLINK,
DEC'D, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 18, 1914.

(24,277)



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1 & 2 In the Court of Claims, December Term, 1896.

No. 20852.

HENRY F. WILLINK
v.
THE UNITED STATES.

1. Petition.

[Filed August 3, 1897. J. R.]

To the Court of Claims:

The claimant, Henry F. Willink, respectfully represents:

1. That he is a citizen of the United States and of the State of Georgia.

2. That he was long prior to the acts hereinafter complained of, the owner of a certain tract or parcel of land on Hutchinson's Island in the State of Georgia opposite the city of Savannah, six hundred feet in length and varying in width from seventy-five to one hundred feet, bounded on the south by the Savannah River, on the east by lands of Elton A. Smith, on the north by other lands of the said Henry F. Willink the claimant, and on the west by lands formerly belonging to George Hall, the same having been in the peaceable, exclusive and uninterrupted use of the claimant for thirty years.

3. That he used and occupied said lands, long prior to the acts herein complained of, for a ship yard and marine railway, having thereon extensive improvements consisting of buildings, wharves, engines, machinery, piles, railway tracks, and other such property forming a complete establishment for the building, launching, and hauling up, repair and refitting, of all vessels visiting the Savannah River and the harbor of Savannah; that he had established there an extensive and lucrative business in the class of work here described.

4. That such improvements extended from above high-water mark on Hutchinson's Island throughout his lands, to the Savannah River, and formed one continuous establishment for the uses aforesaid, each part being requisite to the value of the whole; that it was necessary in the usual and ordinary conduct of the business of this establishment to have a ship-railway for hauling up for repairs; that for the operation of such railway, it was necessary to drive piles along its line, from time to time, not only for its construction but also for its repair and preservation.

5. That the claimant remained continuously, with undisputed title, in undisturbed possession of the ship yard, marine railway and other property aforesaid, until the 25th day of August, 1892, when he received a letter from the attorney of the United States of the Southern District of Georgia, directing him to refrain from driving piles on the line of his said railway, both above and below low-water

mark, on the ground that the piles - where he had driven and was about to drive the piles were inside the harbor line established by the Secretary of War; that it was at the time requisite to drive piles in order to continue the use of his said ship-railway, and the refusal to allow them to be driven prevented the use of the railway and ship yard for the purposes of his business; that in accordance with said direction he discontinued the driving of piles as aforesaid.

6. That said harbor-line included a considerable share of the claimant's property, before described, extending into said property above high-water mark, and was established by authority of section 12 of the act of Congress of August 11, 1888, chapter 860, the same being essential to the preservation and protection of the harbor of Savannah, according to the plan of improvement submitted to Congress by the Chief of Engineers, United States Army, under the direction of the Secretary of War, approved by Congress and carried into effect under appropriation made by the acts of August 13, 1888, chapter 860 (Statutes at Large, volume 25, page 404); September 19, 1890, chapter 907 (Statutes at Large, volume 26, page 431); July 13, 1892, chapter 158 (Statutes at Large, volume 27, page 92) and other later appropriation acts.

7. That by other and later acts, the United States has continued control and dominion over said property inside of the harbor-line aforesaid; that the taking of the real estate of the claimant as herein set forth involved also the taking by the United States of his business thus established, it being impossible to continue it without the occupation and use of the land inside the harbor-line thus taken by the United States, except at a very great cost to the claimant for dredging, laying a new railway and replacing the buildings and machinery.

8. That the acts hereinbefore set forth constituted a taking of the claimant's property for the public use of the United States, and thereby a contract arose on the part of the United States to pay to the claimant just compensation for said property.

9. That the property so taken is more exactly described and valued as follows:

(1) Land occupied by the ship yard, marine railway and engines and machinery appurtenant thereto, the said land being of the value of twenty-five thousand dollars (\$25,000).

(2) Ship railway 575 feet long and cradle 250 feet long, of the value of eighty thousand eight hundred and fifty-eight dollars and thirty-two cents (\$80,858.32).

(3) Foundation of engine and boiler, of the value of one thousand one hundred and fifty-one dollars and sixty cents (\$1,151.60).

(4) Wharf on front and east and west side of railway of the value of one thousand eight hundred and fifty dollars (\$1,850).

(5) Three buildings erected on the land thus appropriated, of the value of nine hundred and fifty dollars (\$950).

5 (6) Sheet piling and timber on each side of railway, of the value of twelve hundred dollars (\$1,200).

(7) Loss of value of business, equivalent to cost of dredging in order to construct new railway, to cost of piles and of building rail-

way and to loss of business by reason of the delay, eighty-six thousand (\$86,000).

10. That by reason of the premises aforesaid a claim has accrued to the claimant against the United States, amounting to one hundred and ninety-eight thousand two hundred and fifty-nine dollars and ninety-two cents (\$198,259.92).

11. That no action has been had upon this claim in Congress or in any of the Departments.

12. That the claimant is the sole owner of this claim and the only person interested therein; that no assignment or transfer has been made of this claim or any part thereof or interest therein; that the claimant is justly entitled to the amount claimed, after allowing all just credits and offsets.

And the claimant prays judgment for one hundred and ninety-eight thousand two hundred and fifty-nine dollars and ninety-two cents (\$198,259.92).

WILLIAM B. KING,
BARROW & OSBORNE,
Attorneys for Claimant.

STATE OF GEORGIA.

County of Chatham, ss:

Henry F. Willink, being first duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true to the best of my knowledge and belief.

H. F. WILLINK, *Claimant.*

Sworn to and subscribed before me this 30th day of July, 1897.

[SEAL.]

C. V. HERNANDEZ,
Notary Public, C. C. Ga.

6 In the Court of Claims, December Term, 1898.

No. 20852.

HENRY F. WILLINK

v.

THE UNITED STATES.

H. Amended Petition.

To the Court of Claims:

The claimant, Henry F. Willink, respectfully represents:

1. That he is a citizen of the United States and of the State of Georgia.

2. That he was long prior to the acts hereinafter complained of, the owner of a certain tract or parcel of land on Hutchinson's Island in the State of Georgia opposite the city of Savannah, six hundred feet in length and varying in width from seventy-five to one hundred

feet, bounded on the south by the Savannah River, on the east by lands of Elton A. Smith, on the north by other lands of the said Henry F. Willink the claimant, and on the west by lands formerly belonging to George Hall, the same having been in the peaceable, exclusive and uninterrupted use of the claimant for thirty years.

3. That he used and occupied said lands, long prior to the acts herein complained of, for a ship yard and marine railway, having thereon extensive improvements consisting of buildings, wharves, engines, machinery, piles, railway tracks, and other such property forming a complete establishment for the building, launching, and hauling up, repair and refitting, of all vessels visiting the Savannah River and the harbor of Savannah; that he had established there an extensive and lucrative business in the class of work here described.

4. That such improvements extended from above high-
7 water mark on Hutchinson's Island throughout his lands, to the Savannah River, and formed one continuous establishment for the uses aforesaid, each part being requisite to the value of the whole; that it was necessary in the usual and ordinary conduct of the business of this establishment to have a ship-railway for hauling up for repairs; that for the operation of such railway, it was necessary to drive piles along its line, from time to time, not only for its construction but also for its repair and preservation.

5. That the claimant remained continuously, with undisputed title, in undisturbed possession of the ship yard, marine railway and other property aforesaid, until the 25th day of August, 1892, when he received a letter from the attorney of the United States of the Southern District of Georgia, directing him to refrain from driving piles on the line of his said railway, both above and below low water mark, on the ground that the points where he had driven and was about to drive the piles were inside the harbor line established by the Secretary of War; that it was at the time requisite to drive piles in order to continue the use of his said ship-railway, and the refusal to allow them to be driven prevented the use of the railway and ship yard for the purposes of his business; that in accordance with said direction he discontinued the driving of piles as aforesaid.

6. That said harbor-line included a considerable share of the claimant's property, before described, extending into said property above high-water mark, and was established by authority of section 12 of the act of Congress of August 11, 1888, chapter 860, the same being essential to the preservation and protection of the harbor of Savannah, according to the plan of improvement submitted to Congress by the Chief of Engineers, United States Army, under the

8 direction of the Secretary of War, approved by Congress and carried into effect under appropriation made by the acts of August 13, 1888, chapter 860 (Statutes at Large, volume 25, page 404); September 19, 1890, chapter 907 (Statutes at Large, volume 26, page 431); July 13, 1892, chapter 158 (Statutes at Large, volume 27, page 92) and other later appropriation acts.

7. That by other and later acts, the United States has continued control and dominion over said property inside of the harbor-line aforesaid, until the time hereafter set forth; that the taking of the real

estate of the claimant as herein set forth involved also the taking by the United States of his business thus established, it being impossible to continue it without the occupation and use of the land inside the harbor-line thus taken by the United States, except at a very great cost to the claimant for dredging, laying a new railway and replacing the buildings and machinery.

8. That the United States continued in the sole control and possession of his property aforesaid up to the 25th day of January, 1898, long after the petition in this cause was presented to this Court; that on or about said date the claimant was notified by the officer of engineers of the United States Army, in charge of harbor improvements at Savannah, that the harbor-line theretofore fixed as herein set forth had been changed and a new line established practically the same as existing prior to the establishment of the line hereinbefore described and that he was at liberty to resume possession and control of the property of which he had been deprived by the aforesaid acts of the United States; that the claimant thereupon entered again into possession thereof.

9. That the acts hereinbefore set forth constituted a taking of the claimant's property for the public use of the United States, and thereby a contract arose on the part of the United States to pay to the claimant just compensation for said property.

10. That the property so taken is more exactly described and valued as follows:

(1) Land occupied by the ship yard, marine railway and engine- and machinery appurtenant thereto, the said land being of the value of twenty-five thousand dollars (\$25,000).

(2) Ship railway 575 feet long and cradle 250 feet long, of the value of eighty thousand eight hundred and fifty-eight dollars and thirty-two cents (\$80,858.32).

(3) Foundation of engine and boiler, of the value of one thousand one hundred and fifty-one dollars and sixty cents (\$1,151.60).

(4) Wharf on front and east and west side of railway of the value of one thousand eight hundred and fifty dollars (\$1,850).

(5) Three buildings erected on the land thus appropriated, of the value of nine hundred and fifty dollars (\$950).

(6) Sheet piling and timber on each side of railway, of the value of twelve hundred dollars (\$1,200).

(7) Loss of value of business, equivalent to cost of dredging in order to construct new railway, to cost of piles and of building railway and to loss of business by reason of the delay, eighty-six thousand dollars (\$86,000).

11. That by reason of the premises aforesaid a claim has accrued to the claimant against the United States as follows:

(1) For the use and occupation of said land, for five years and five months.

(2) For the use of his ship-railway and the necessary deterioration thereof.

(3) For the use and deterioration of the foundation of engine and boiler.

(4) For the use and deterioration of wharves aforesaid.

(5) For use and occupation of three buildings aforesaid and necessary deterioration thereof.

10 (6) For use and deterioration of piling and timber aforesaid.

(7) For loss of value of business during the time of said occupation.

The whole making a total of fifty thousand dollars.

12. That this claim has been at various times before various engineer officers and boards but no final action was ever taken thereon; that no action has been had on this claim in Congress.

13. That the claimant is the sole owner of this claim and the only person interested therein; that no assignment or transfer has been made of this claim or any part thereof or interest therein; that the claimant is justly entitled to the amount claimed, after allowing all just credits and offsets.

And the claimant prays judgment for forty thousand dollars.

WILLIAM B. KING,

BARROW & OSBORNE,

Attorneys for Claimant.

STATE OF GEORGIA,

County of Chatham, ss:

Henry F. Willink, being first duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true to the best of my knowledge and belief.

H. F. WILLINK, *Claimant.*

Sworn to and subscribed before me this 20th day of December, 1898.

[SEAL.]

LEANDER BUTLER,

N. P., C. C., Ga.

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III. *Traverse.*

In the Court of Claims of the United States.

No. 20852.

HENRY F. WILLINK

v.

THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

LOUIS A. PRADT,

Assistant Attorney General.

12 IV. *Suggestion of Death and Motion to Substitute.*

(Filed November 1, 1913.)

No. 20852.

HENRY F. WILLINK

v.

THE UNITED STATES.

Now come King & King, attorneys of record, and suggest to the court the death of Henry F. Willink, the claimant in this case, and present herewith letters testamentary, granted to Jennie A. Willink on his estate, and thereupon appear in behalf of said Jennie A. Willink, and move the court that she be substituted in this cause as claimant.

KING & KING,

Attorneys for Claimant.

Allowed under rules 35 and 45.

JOHN RANDOLPH,

*Assistant Clerk Court of Claims.*13 V. *Argument and Submission.*

This case was argued on the 17th day of March, 1914, by Mr. George A. King for the claimant and by Mr. George H. Thorne for the defendants, and submitted.

15 VI. *Findings of Fact and Conclusion of Law.*

(Filed April 27, 1914.)

Court of Claims.

No. 20852.

HENRY F. WILLINK

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant was, long prior to the acts hereinafter set forth, the owner, and in possession, of a certain tract of land on Hutchinson's

Island, opposite the city of Savannah, in the State of Georgia, known as wharf lots 4, 5, 6, 7, and 8, having an aggregate frontage on the Savannah River of 625 feet, more or less, and extending back from the river for a distance varying from 375 to 450 feet.

II.

The claimant had, for many years, occupied this tract of land in the business of building and repairing vessels, and had made there the following improvements:

A marine railway, consisting of a track about 475 feet long, protected by piling where in the water, extending from low-water mark diagonally into the property, substantially as shown on the official map attached to these findings and marked "Exhibit A."

(Here follows map marked page 14.)

Boilers and machinery fitted for the hauling of vessels upon this railway and holding them there for repair and lowering them again into the water.

A canal on the eastern side of the property extending its entire depth, used for keeping timber.

An office, a blacksmith shop, and a tool house on the east side of the property.

Five tenement houses on the west side.

A wharf on the west boundary.

A wharf west of the ship railway left unfinished.

A boathouse on the west side.

These facilities of claimant's yard permitted the hauling out and repair of vessels up to 1,250 tons.

16

III.

For many years prior to the year 1889 the United States has been engaged in making improvements in the Savannah River and Harbor, these including that part of the river opposite the city of Savannah on which the claimant's land fronted, under the following acts of Congress:

Act of June 10, 1872, 17 Stat. L. 373:

"For the improvement of Savannah Harbor and River, Georgia, \$50,000."

Act of March 3, 1873, 17 Stat. L. 563:

"For the improvement of Savannah Harbor and River, Georgia, \$50,000."

Act of June 23, 1874, 18 Stat. L. 240:

"For continuing the improvement of the harbor at Savannah, Georgia, \$50,000."

Act of March 3, 1875, 18 Stat. L. 459:

"For the improvement of the harbor at Savannah, Georgia, \$70,000."

Act of August 14, 1876, 19 Stat. L. 134:

"For the improvement of the harbor at Savannah, Georgia, \$62,000."

Act of June 18, 1878, 20 Stat. L. 153:

"For improving harbor at Savannah, Georgia, \$70,000."

Act of March 3, 1879, 20 Stat. L. 365:

"For improving harbor at Savannah, Georgia, \$100,000."

Act of June 14, 1880, 21 Stat. L. 181:

"Improving harbor at Savannah and Savannah River, Georgia—continuing improvement, \$65,000."

Act of March 3, 1881, 21 Stat. L. 470:

"Improving Savannah Harbor and River, Georgia, \$65,000—of which sum \$1,000 may be applied to payment of damages for land taken for widening the channel opposite Savannah."

Act of August 2, 1882, 22 Stat. L. 194:

"Improving harbor at Savannah, Georgia—continuing improvement of the harbor and river, \$200,000."

Act of July 5, 1884, 23 Stat. L. 135:

"Improving harbor at Savannah, Georgia—continuing improvements, \$200,000."

Act of August 5, 1886, 24 Stat. L. 313:

"Improving harbor at Savannah, Georgia—continuing improvement, \$150,000."

Act of August 5, 1886, 24 Stat. L. 330, 331:

17 "Sec. 6. The Secretary of War is hereby directed, at his discretion, to cause examinations or surveys, or both, to be made, and the cost of improvements to be estimated at the following localities, to-wit:

* * * * *

"Savannah River from cross tides above Savannah to the bar, with a view to obtaining twenty-eight feet of water in the channel."

Act of August 11, 1888, 25 Stat. L. 404:

"Improving harbor at Savannah, Georgia—to complete existing project, \$180,000."

Act of September 19, 1890, 26 Stat. L. 431:

"Improving harbor at Savannah, Georgia—continuing improvement on extended project, \$350,000."

Act of July 13, 1892, 27 Stat. L., 92:

"Improving harbor at Savannah, Georgia—continuing improvement, \$318,750: Provided, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improvement, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate \$2,831,250, exclusive of the amount herein and heretofore appropriated."

Act of March 3, 1893, 27 Stat. L., 603:

"For improving harbor at Savannah, Georgia—continuing improvement, \$1,000,000."

Act of August 18, 1894, 28 Stat. L., 404:

"For improving harbor at Savannah, Georgia—continuing improvement, \$975,000."

Act of March 2, 1895, 28 Stat. L., 947:

"For improving harbor at Savannah, Georgia—completing improvement, \$856,250."

IV.

Prior to the appropriation by the act of 1890 the plan of improvement had been carried on under two projects, known as the projects of 1873 and 1882. This plan was correctly summarized as follows by the officer of engineers in charge of the work, and reported in the Report of Chief of Engineers, U. S. Army, 1888 (vol. 2, p. 1006):

"The plan of improvement under which operations have been carried on up to date provides for the establishment of a channel from Tybee Roads to the city of Savannah, practicable at high tide for vessels drawing 22 feet of water, and the widening of the channel of the river opposite the city to 600 feet, of uniform depth with the balance of the channel."

One of the main features of these projects was, as also likewise stated (*Ibid.*, p. 1006):

"To regulate the width of the river along the city front by enlarging the waterway at certain points, and by contracting it by wing dams at Garden Bank where the widths are excessive."

18 In 1887, in obedience to an act of Congress approved August 5, 1886, a project with estimates of cost of improvement for obtaining 28 feet of water from the city of Savannah to the sea was submitted, and is printed as part of House Ex. Doc. No. 37, Fiftieth Congress, first session (quoted from *Ibid.*, p. 1006):

One of the principal features of this project was, as also stated officially (*Ibid.*, p. 1006):

"To build a training wall from the lower end of Marsh Island to Kinsey's Point, to enlarge the river at the city to a width of 600 feet by cutting off a portion of Hutchinson's Island, and to connect the ends of the Garden Bank wing dams by a training wall extending from the old dry dock to a point above Fig Island light."

The following, officially reported by Brevet Maj. Gen. Q. A. Gillmore, colonel of engineers, under date of October 12, 1887, correctly states the conditions existing on that date (*Ibid.*, p. 1061):

"The work of widening the waterway opposite the city to 600 feet, commenced under the previous projects, has been only partially accomplished, and should now be completed by the cutting away of a strip of land on the Hutchinson's Island side. A frontage of about 2,300 feet, averaging 62½ feet in width, should be removed. All but 500 feet of the front contains wharves, the majority in a more or less dilapidated condition. The land is held by sundry parties, is occupied by improvements, such as sawmills, log ponds, a shipyard and marine railway, and machine shops.

"It is understood that the city authorities agree to give, and the landholders to accept, an equal area of land directly in rear of the land to be ceded. The United States is expected to pay the expenses of moving back and putting up again on the new sites the several establishments now existing, and of replacing the wharves along the front as it may be newly established. The aggregate claims for damages on this account will probably amount to \$45,000 or \$50,000.

"It may be proper, after the land on Hutchinson's Island shall have been cut away, to extend the line of bulkheads down to the lower end of Fig Island. The present irregularities of the shore line opposite the city will then disappear, the tidal currents being guided by training walls on both sides, and the maintenance of the increased depth of the harbor rendered less expensive."

The project submitted by the officer of the engineers immediately in charge of the improvement at that time, dated August 25, 1887, embraces the following report and recommendation (*Ibid.*, p. 1070):

"For a distance of 2,500 feet below Kinsey's Point the river is unduly contracted.

"The tidal flow is greatly obstructed, the rate of propagation of the tidal wave being reduced from 19 miles per hour at the head of Elba Island to only 6 miles per hour at the city. A strip of land should be cut away from the Hutchinson's Island side and the river widened to 600 feet. The damages to private property ought not to exceed \$45,000."

In the Report of the Chief of Engineers for 1890, part 2, page 1246, the summary and main features of the projects of 1873 and 1882 and of the project for obtaining 28 feet of water were again stated in the same language already quoted from the same officer's report for 1888; and there was added as a reason for requiring a project increasing the depth contemplated by the projects of 1873 and 1882, the fact of—

"A mean high-water depth of 22 feet being entirely insufficient to accommodate the large and rapidly growing commerce upon the Savannah River."

In the same report (p. 1258) a revised project of improvement for the Savannah River, with a view to obtaining a depth of 26 feet at mean low water, was transmitted to Congress, approved by the Chief of Engineers of the Army, this project having been prepared and submitted because the project for securing a depth of 28 feet required so large an expenditure and no action had been taken upon it by Congress. In submitting and approving this plan the Chief of Engineers, under date of July 21, 1890, reported as follows (*Ibid.*, p. 1258):

"The plan of improvement under which operations have been carried on up to date provides for the establishment of a channel from Tybee Roads to the city of Savannah, practicable at high tide for vessels drawing 22 feet of water, and the widening of the channel of the river opposite the city to 600 feet, of uniform depth with the balance of the channel."

The project submitted by the officer immediately in charge, in accordance with the orders just stated, includes the following as one of the means of the improvement (*Ibid.*, p. 1261):

"A training-wall from the lower end of Marsh Island to Kinseys Point, and the widening of the unduly contracted region below Kinseys Point."

And among the statements of expenditures under this project was the following (Report of the Chief of Engineers for 1890, Part 2, p. 1261):

"Possible land damages to Hutchinsons Island, \$45,000."

The total estimate of the improvement under this project was \$3,500,000.

The appropriations made by Congress subsequent to the adoption of this plan were for the purpose of carrying out this plan and were as follows:

Act of 1890 (26 Stat. L., 431)	\$350,000
Act of 1892 (27 Stat. L., 92)	318,750
Act of 1893 (27 Stat. L., 603)	1,000,000
Act of 1894 (28 Stat. L., 404)	975,000
Act of 1895 (28 Stat. L., 947)	850,250
Total	3,500,000

V.

The harbor line opposite the city of Savannah was established by the Secretary of War May 1, 1889, in accordance with section 12 of

the act of August 11, 1888 (25 Stat. L., 425). It cuts off a strip of land from Hutchinsons Island averaging about 100 feet wide for a distance of about 2,500 feet, and the projects for the improvement of the harbor have contemplated the dredging away of this portion of the island by the United States to give a uniform clear width of 600 feet in the river opposite the city.

20 A contract was made on October 20, 1892, by Captain Carter, and approved by the Chief of Engineers, for cutting off the land outside the harbor line fixed by the order of May 4, 1889, but the work was never done, the appropriation having been used for other purposes, and the project, except as to the future, having been completed.

VI.

The harbor line aforesaid, shown on Exhibit A, cut off a portion of the claimant's property, about 86 feet in width along its entire front, including 133 linear feet of the ship railway.

VII.

The unobstructed use of the railway is an essential to the use of any of the shipbuilding and repairing plant. In order to use this railway it was necessary to keep the lower end, which was under water at high tide, free from deposits of mud. For this purpose the claimant had built sheet piling on both sides of it. This was found effectual for the purpose, except that the piling rotted after a number of years' use, and new piling was required.

VIII.

This condition existed in the summer of 1892, and the claimant proceeded to renew his piling, and had more than half completed his work when he was told by Captain Carter, the engineer officer in charge of the improvements in Savannah, to desist, and was notified by him that he must remove everything which was on the outside of the harbor line; and on the 26th or 27th day of August, 1892, he ceased his improvements in consequence of the following letter from the United States district attorney for the southern district of Georgia:

"MACON, GA., Aug. 24th, 1892.

"H. F. Willink, Esq., Savannah, Ga.

"SIR: O. M. Carter, Capt. Corps of Engineers, U. S. A., reports that you have had some piles driven in Savannah River outside of the bulkhead line, opposite Whitaker st., Savannah, obstructing navigation, in violation of river and harbor act of Sept. 19, 1890 (26 Statutes L., p. 453, 454). You will at once desist from further obstruction, and remove such piling as Capt. Carter desires removed, i. e., all piling outside of the bulkhead line. Unless this matter is attended to at once I will have to take out proceedings in court to compel compliance and to recover the penalties prescribed by the statute. I will be in Savannah in about two weeks to look after this

matter, and I trust that the difficulties will have been adjusted to the satisfaction of Capt. Carter by that time.

"Yours, truly,

MARION ERWIN,

"U. S. Atty'g."

IX.

The claimant was also rebuilding his wharf on the west side of the railway, and had it framed and all finished but planking it, but was forbidden by the engineer in charge to cover it with plank and obliged to leave it unfinished.

21

X.

The result of ceasing work as aforesaid was that the deposits of mud filled up the railway to such an extent that vessels of large draft could not be hauled up on the railway, and the claimant thereafter was obliged to confine his work to much smaller vessels than he had heretofore been able to repair.

XI.

The chief profit in the claimant's business was in the repair of larger vessels, from which he was thus shut out.

XII.

In order to continue work on the smaller vessels it was necessary to keep up almost continuous dredging at a large expense. By storing the piling would have obviated the need of dredging.

XIII.

The conditions herein set forth continued until December, 1897. On the 2d day of said month the Secretary of War established a new harbor line, of which notice was given the claimant on the 8th of said month.

This line, shown on Exhibit A, restored that existing prior to May 4, 1889, and the claimant was thereby restored to possession of his property as it had existed prior to that date.

XIV.

If the claimant is entitled to recover for losses and injuries consequent to his having complied with the demands of the defendants' officers, set forth in Finding VIII, his damages were as follows:

For the expense of dredging out the entrance, within the boundaries of his own land, of the approach to his marine railroad, \$7,697, such dredging having been rendered necessary in consequence of the order of Captain Carter forbidding him to drive piles and protect the approach from the caving in of the banks and the deposits of the river.

For his losses in business consequent to the diminished depth of water and his inability to dock large vessels, \$12,500.

22

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and his petition is therefore dismissed.

23 VII. *Opinion of the Court, Delivered on a Former Trial, May 25, 1903.*

NOTT, *Ch. J.*, delivered the opinion of the court:

This is one of those cases where a citizen of the United States has suffered serious loss by ignorance of Federal law and too great reliance upon the assertions and assurances of officers of the Government. The court, nevertheless, has regretfully reached the conclusion that his losses and injuries lie beyond the limits of judicial redress.

The misfortunes of the claimant began with the act 11th August, 1888 (25 Stat. L., p. 425), which authorized the Secretary of War to establish a harbor line. On the 14th May, 1889, the Secretary, basing his plan undoubtedly on the existing plan of the Chief of Engineers for improving the harbor of Savannah by widening the river, established a line which clipped off a strip of Hutchinson's Island opposite the city 100 and more feet in width, the property of the claimant, and comprising substantially all of his river frontage. Two years afterwards Congress enacted another statute, which authorized the Secretary to establish harbor lines generally, and contained a stringent provision making it a misdemeanor, punishable by fine and imprisonment, for any person to make encroachments beyond a harbor line established by the Secretary. (Act 19th September, 1890; 26 Stat. L., p. 454, sec. 12.) Again, two years later, Congress enacted a third statute, making an appropriation of \$318,750 for "improving harbor at Savannah," and authorizing the Secretary of War to enter into contracts "for such materials and work as may be necessary to complete the present project of improvement." (Act 13th July, 1892; 27 Stat. L., p. 92.) Up to this time no statutory authority existed for acquiring the land necessary for widening the river according to "the present project of improvement," either by contract or judicial proceedings, unless it was to be found in the general statutes. (The acts 24th April, 1888, 25 Stat. L., p. 94, and 1st August, 1888, *ib.*, 357.)

Such being the legislative conditions of the case, Capt. Oberlin M. Carter, the officer of engineers in charge of the improvement of the harbor of Savannah, proceeded, under the appropriation act of July, 1892, to advertise for proposals; and on the 20th of October, 1892, entered into a contract for dredging the river and cutting away the claimant's land. This contract was approved by the Chief of Engineers, but was never carried into effect beyond dredging the river. That is to say, the contractors never entered or encroached upon the

property of the claimant. The claimant was threatened with this impending cutting away of his river frontage, but his land was not actually taken or occupied by the contractors.

But about the time that Captain Carter was advertising for proposals he also gave notice to the claimant that he would shortly begin the work of cutting away his land, and that he (the claimant) must cease making certain improvements which he was then making on the strip which would be cut away. These improvements were
 24 vital to the claimant's business—that of docking vessels for repairs. The claimant accordingly called on Captain Carter, who reiterated that he must remove everything capable of removal outside of the new harbor line.

A week or two later Captain Carter's authority was reenforced by a letter from the United States district attorney—a letter which is remarkable in its terms and intimations and in the effect which it produced upon the claimant. It is an important letter inasmuch as the claimant's counsel regards it as in legal effect the taking of the land—as the Government's assertion of its right to take the land to the exclusion of the owner. It is in these words:

"MACON, GA., Aug. 24th, 1892.

"H. F. Willink, Esq., Savannah, Ga.

"SIR: O. M. Carter, Capt. Corps of Engineers, U. S. A., reports that you have had some piles driven in Savannah River outside of the bulkhead line, opposite Whitaker st., Savannah, obstructing navigation, in violation of river and harbor act of Sept. 19, 1890 (26 Statutes L., p. 453, 454). You will at once desist from further obstruction, and remove such piling as Capt. Carter desires removed, i. e., all piling outside of the bulkhead line. Unless this matter is attended to at once I will have to take out proceedings in court to compel compliance and to recover the penalties prescribed by the statute. I will be in Savannah in about two weeks to look after this matter, and I trust that the difficulties will have been adjusted to the satisfaction of Capt. Carter by that time.

"Yours, truly,

MARION ERWIN,

"U. S. Atty."

The claimant accepted this reference to the act 19th September, 1890, as a hint that he was putting himself in jeopardy, and interposed no more objections to the demands of the Government's officers. The whole of his tract was not occupied; the strip of land was not cut away; the river frontage remained as it was; but for five years he was (as he believed) debarred from making a cutting or driving a pile on his own land. At the end of five years (December 2, 1897), after the well-known downfall of Captain Carter, the Secretary of War, by a stroke of his pen, established a "modified" harbor line opposite the city of Savannah—that is to say, he reestablished the old harbor line. The claimant was thereby restored to the undisputed possession of his property, but during the interval his possession had been impaired and the valuable part of his business de-

stroyed. He now sues for a constructive use and occupation by the Government.

After the act 13th July, 1892, authorizing contracts for work "necessary to complete the present project" of improving the harbor, and after the approval by the War Department of the contract 20th October, 1892, for cutting away the claimant's river frontage, it can not be maintained that Captain Carter was wholly without authority to use and occupy the claimant's land. The court does not intend to intimate that he could enter upon the land against the claimant's protest and occupy it *vi et armis* without his consent; but merely that his occupancy, as an agent of the defendants, for purposes incidental to the work of improvement and with the claimant's assent, express or implied, would not have been *ultra vires*. Undoubtedly
25 for a trivial occupancy of this character, which has not hitherto been adverted to, a contract in the nature of a tenancy should be implied.

But it seems to the court only too obvious that the action is not brought for use and occupation, but to recover damages sustained and suffered by reason of the illegal and unjustifiable acts and intimidations of two Government officers. As to the act 19th September, 1890, upon which these officers seem to have based their action, it is one of those statutes which, being against common right, is to be strictly construed and which is to be interpreted and applied in accordance with the constitutional rights of individuals. The pains and penalties prescribed for erecting obstructions must be restricted to obstructions below low watermark—to obstructions erected, not by an owner of private property on his own land, but obstructions erected in public waters on land which, if it belongs to anyone, belongs to the United States. Certain it is that Congress never intended that an executive officer, by drawing a line through a man's farm, should make it unlawful for him to step over it or subject him to fine and imprisonment for driving a pile or building a house on his own land. The harbor line of the Secretary of War, so far as it affected dry land and private ownership, was a line in the air—a line upon paper only—until the Government should acquire a legal right in harmony with the Constitution and in the manner prescribed by law. The claimant's mistake was that he did not appeal from one officer to the Secretary of War and from the other to the Attorney-General.

The fact has been adverted to that, apart from the loss and damage which the claimant suffered in consequence of his complying with the demands of the engineer officer and the district attorney, the officers in charge of the improvement of the harbor used, with his consent, his wharves and a portion of his land for dockage and storage purposes. From this use and occupation the Government derived a benefit, and for it there should be recovered a reasonable rent, which is fund to be \$2,000.

The judgment of the court is that the claimant recover \$2,000, Wright, J., dissenting.

VIII. *Judgment of the Court.*

No. 20852.

JENNIE A. WILLINK, Executrix of Henry F. Willink, Dec'd.
v.
THE UNITED STATES.

At a Court of Claims, held in the city of Washington on the 27th day of April, 1914, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge and decree that the petition of the claimant, Jennie A. Willink, executrix of Henry F. Willink, deceased, be, and the same is hereby, dismissed.

BY THE COURT.

IX. *Application for Appeal.*

In the Court of Claims.

No. 20852.

JENNIE A. WILLINK, Executrix of Henry F. Willink, Dec'd.
v.
THE UNITED STATES.

From the judgment rendered in this cause on the 27th day of April, 1914, the claimant, Jennie A. Willink, executrix of Henry F. Willink, deceased, by her attorneys of record, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Presented in open Court June 12th, 1914.

Whereupon it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

In the Court of Claims.

No. 20852.

JENNIE A. WILLINK, Executrix of Henry F. Willink, Dec'd.
v.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above

entitled cause, of the findings of fact, and conclusion of law, opinion, of the judgment of the Court, of the application of the claimant for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and the seal of the Court of Claims this 16 day of June, A. D. 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,

Assistant Clerk Court of Claims.

Endorsed on cover: File No. 24,277. Court of Claims. Term No. 180. Jennie A. Willink, executrix of Henry F. Willink, deceased, appellant, vs. The United States. Filed June 18th, 1914. File No. 24,277.